No. 15,353

IN THE

United States Court of Appeals

For the Ninth Circuit

WINSTON CHURCHILL HENRY,
Appellant,

vs.

PAUL J. MADIGAN, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

Jurisdiction is invoked under Section 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant petitioned for a writ of habeas corpus on May 9, 1956 on the ground that the Warden of Alcatraz Penitentiary improperly interpreted the term of the sentences under which he was confined (Tr. 1-4). The District Court issued an order to show cause why a writ of habeas corpus ought not to be granted on May 10, 1956 (Tr. 11). On May 21, 1956

respondent, appellee here, filed a return to the order to show cause (Tr. 12-19). This return incorporated, among other things, the two judgments and commitments concerning which question is made here. Petitioner was first sentenced on January 26, 1950 in the District of Hawaii for violation of the narcotic laws (Tr. 14). On the first count of the indictment he was sentenced to a term of four years and to pay a fine of $1,000. On the second count of the indictment he was sentenced to a term of two years and to pay a fine of $1,000; "the sentences of imprisonment to run consecutively." (Tr. 15). On May 3, 1951 the defendant was sentenced for another violation of the narcotic laws (Tr. 17). Appellant's sentence under this judgment provided that he was to be committed to the custody of the Attorney General for imprisonment for a period of two years "to run consecutively with any *sentences* now serving." (Emphasis added). On June 5, 1956, a hearing was held before the Honorable Edward P. Murphy, district judge, and it was ordered that the petition for habeas corpus be denied, and the order to show cause discharged (Tr. 20). Appeal was then timely made to this Court from Judge Murphy's order (Tr. 21).

QUESTIONS PRESENTED.

I. DOES THE USE OF THE PREPOSITION "WITH" IN CONJUNCTION WITH THE WORD CONSECUTIVE PRECLUDE THE IMPOSITION OF A CONSECUTIVE SENTENCE?

II. WHEN A JUDGMENT READS "TO RUN CONSECUTIVELY WITH ANY SENTENCES NOW SERVING, AND PETITIONER IS SERVING TWO SENTENCES, DOES THE SENTENCE COMMENCE TO RUN AT THE EXPIRATION OF THE TERM OF THE FIRST SENTENCE, OF OF THE SECOND SENTENCE?

ARGUMENT.

I. THE USE OF THE PREPOSITION "WITH" DOES NOT PRECLUDE THE IMPOSITION OF A CONSECUTIVE SENTENCE.

Appellant relies on the case of *Bledsoe v. Johnston* (9th Cir.), 154 F. 2d 458, in support of his contention that the use of the preposition "with" prevents an effective judgment for consecutive sentences. The *Bledsoe* case does contain language which lends some support to petitioner's contention. However, the portion of the case relied upon by appellant was the *purest dicta.* It was unnecessary to the decision in the case. This Court, since the *Bledsoe* case, has been faced with the contention made by appellant on numerous occasions. In each case this Court has observed that the statement made in the *Bledsoe* case was mere dicta, unnecessary to the decision in the case, and did not represent a holding on the part of this Court of Appeals. In *Butterfield v. Wilkinson* (9th Cir.), 215 F. 2d 320, this Court stated:

> "As respects the use of the phrase 'consecutively with' rather than 'consecutively to' it seems to us that for all practical purposes one manner of putting it is as clear as the other."

Prior to the *Bledsoe* case, this Court directly held that a sentence to run "consecutively with another sentence" was properly interpreted to run consecutively.

Martini v. Johnston (9th Cir.), 103 F. 2d 597, cert. den.

The *Bledsoe v. Johnston* dicta was also laid to rest in the case of *Lipscomb v. Madigan* (9th Cir.), 224 F. 2d 410. The most recent case in which this Court passed on a judgment in which the phrase "consecutive with" was used is the case of *Colbert v. Madigan* (9th Cir.), 229 F. 2d 157. The same contention made here was made there. The Court held:

> "There was no merit in any of these contentions. The plain meaning of the above quoted language of the judgment in action No. 15298 was that the sentence imposed in that action should begin at the expiration of the sentence imposed in action No. 15127, and that the two sentences should run consecutively, not concurrently."

In *U. S. v. Daugherty,* 269 U.S. 360, the Supreme Court said that while "sentences in criminal cases should reveal with fair certainty the intent of the Court and the exclusion of any serious misapprehensions by those that must execute them, the elimination of every possible doubt cannot be demanded." It might be in more accord with the necessity of English grammar to use the preposition "to" rather than the preposition "with". However, the use by the Court of the word consecutively precludes any intention that the sentence should run concurrently. The Hawaii Court obviously intended that the judgment order run consecutively since it used the word consecutively. In-

terpreting consecutively to read concurrently would be a clear perversion of the sentencing Court's intendment.

II. THE COURT INTENDED THAT ITS JUDGMENT ORDER RUN CONSECUTIVELY WITH ANY SENTENCES NOW SERVING. (Emphasis added.)

The record at page 18 shows that the plural "sentences" was in fact used by the Hawaii Court. Appellant quotes some language from the case of *Mayes v. Madigan,* Civil No. 35004, in the United States District Court for the Northern District of California, Southern Division, reported at 137 F. Supp. 1. The opinion in the *Mayes* case, as originally reported, relied on the cases of *Kirk v. United States,* 185 F. 2d 185, and *Crow v. U. S.*, 186 F. 2d 704. There the Court stated:

> "A prisoner serving the first of several consecutive sentences is not serving the other sentences."

Subsequent to the original decision in the *Mayes* case, the Supreme Court in the case of *Affronti v. U. S.,* 350 U.S. 79, disapproved the *Kirk* case. It is to be noted in the *Affronti* case the Supreme Court consistently treated a sentence which is composed of several consecutively running counts as one general sentence. This would seem to be in accord with the policy of Section 4641 of Title 18 *U.S.C.,* which treats a series of sentences in the aggregate as one general sentence. See also Section 4643 of Title 18 *U.S.C.,* in which release is ordered at the expiration of the "term of

sentence." However, in the present case we do not reach the problem posed in the *Mayes* case. Appellant was serving two sentences at the time of the May 3, 1951 judgment. The Court by the use of the plural sentences obviously referred to the aggregate sentence consisting of sentences on two counts of the indictment. Furthermore, the use of the word "any" imports an intent that appellant's sentence on the May 3, 1951 judgment should commence following the expiration of all terms of imprisonment which petitioner was then serving. As was stated in the *Daugherty* case supra, "The elimination of every possible doubt cannot be demanded." This judgment, however, makes it completely clear that the May 3, 1951 sentence should follow the sentence imposed on November 26, 1950, where consecutive sentences were imposed on separate counts of the indictment.

The judgment below should be affirmed.

Dated, San Francisco, California,
January 9, 1957.

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